STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HENDRIK B. HELLEMAN,

Defendant-Appellee.

UNPUBLISHED
September 10, 1999

No. 217190
Macomb Circuit Court
LC No. 98-002619 FH

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ.

O'CONNELL, J. (dissenting).

I respectfully dissent. I would reverse the circuit court's order granting defendant's motion to quash the information and would reinstate the charge against defendant. Defendant was charged with intentionally and without authorization accessing a computer to delete data, involving an aggregate amount of at least $20,000. MCL 752.795; MSA 28.529(5), and MCL 752.797(1)(d)(i); MSA 28.529(7)(1)(d)(i). The district court bound defendant over for trial, but the circuit court granted defendant's motion to quash the information. I disagree with the majority's conclusion that the district court abused its discretion in binding defendant over for trial.

This Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion in binding defendant over for trial. *People v Abraham*, 234 Mich App 640, 656; ___ NW2d ___ (1999). A reviewing court may not substitute its judgment for that of the district court and, instead, is limited to determining whether an abuse of discretion occurred. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). An abuse of discretion exists only where an unprejudiced person would conclude that there was no justification or excuse for the ruling. *Id*. I find no abuse of discretion in the district court's bindover of defendant.

The district court must bind a defendant over for trial if, at the end of the preliminary examination, it concludes that probable cause exists to believe that a felony has been committed and that the defendant committed it. *Abraham*, *supra* at 655; MCR 6.110(E); MCL 766.13; MSA 28.931. Probable cause exists where "the evidence is sufficient to cause an individual marked by discreetness

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

and caution to have a reasonable belief that the defendant is guilty as charged. *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997). Although some evidence must be presented from which each element of the crime may be inferred, proof of the defendant's guilt beyond a reasonable doubt is not required, and the defendant may not be discharged merely because the evidence conflicts or raises a reasonable doubt of the defendant's guilt. *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998). Here, I would conclude that the district court did not abuse its discretion in finding that probable cause existed to believe that defendant committed the charged offense.

Defendant was charged with intentionally and without authorization accessing a computer to acquire, alter, damage, delete, or destroy property or otherwise use the service of the computer, involving an aggregate amount of $20,000 or more. MCL 752.795; MSA 28.529(5), and MCL 752.797(1)(d)(i); MSA 28.529(7)(1)(d)(i). "Property" is defined to include computer data or any other intangible item of value. MCL 752.793(1); MSA 28.529(3)(1). "Aggregate amount" is defined as "any direct or indirect loss incurred by a victim including, but not limited to, the value of any money, property, or service lost, stolen, or rendered unrecoverable by the offense . . . ." MCL 752.792(2); MSA 28.529(2)(2). I would conclude that evidence was presented at the preliminary examination from which all the required elements of the charged offense could be inferred. I would reject defendant's argument that the evidence was insufficient to establish probable cause because no loss occurred.[1]

The prosecutor presented evidence that defendant was an employee of Breed Technologies who was performing computer-simulated testing of restraint systems for automobile airbags. Defendant's employment was terminated, and he was allowed to return to his work station unsupervised to gather his belongings. He left the building approximately two hours after being notified that his employment was terminated. Shortly thereafter, Breed Technologies needed to access data from the project on which defendant had worked, but the data was missing from the computer defendant had used. Testimony indicated that replacing the data would cost Breed Technologies approximately $150,000. Defendant informed Breed Technologies that the data was possibly lost from the computer being turned off improperly, but testimony indicated that such a large amount of information would need to be intentionally removed.

Breed Technologies attempted unsuccessfully to obtain the missing data from backup tapes, one of which was made months before the data was discovered missing, and others of which were provided by defendant. Eventually, after criminal charges were filed, defendant provided Breed Technologies with a readable backup tape containing the missing data. Defendant contends that Breed Technologies was at all relevant times in possession of backup tapes containing the data and that its inability to read the tapes was caused by problems with its own equipment. Therefore, defendant argues, Breed Technologies did not suffer any loss at all, and defendant cannot be guilty of the charged offense.[2]

However, the evidence was conflicting whether Breed Technologies was in fact in possession of backup tapes containing the missing data. Testimony indicated that one backup tape had been made months before the data was discovered missing. That tape was unreadable, but even if it had been readable, it might not have contained all the needed data because it was not a recent backup. Other backup tapes were located near defendant's desk, but these were again unreadable, and, in any event,

were not known to contain the missing data. Other backup tapes were provided by defendant, but again were unreadable. Defendant finally provided a readable backup tape containing the data. Even if, as defendant asserts, the data on all the backup tapes could have been accessed if Breed Technologies had taken them to a specialized facility, there is no indication that the tapes contained a recent version of the missing data.

To be sure, the evidence is conflicting whether the missing data was available to Breed Technologies. However, the evidence presented was sufficient from which to infer each element of the charged offense. See *Goecke, supra* at 469-470. The evidence indicates that defendant had unsupervised access to his workstation after being fired, that computer data was later found to be missing from defendant's computer, that the cost of replacing the information was approximately $150,000, and that the data was only retrieved after defendant provided Breed Technologies with a readable backup tape. This evidence was sufficient from which to infer that defendant intentionally accessed his workstation computer after being fired and deleted more than $20,000 worth of information. Although the evidence might not be sufficient to demonstrate defendant's guilt beyond a reasonable doubt, such a level of proof is not needed in order to find probable cause to believe that defendant committed the charged offense. In light of the evidence presented at the preliminary examination, I cannot conclude that the district court's decision to bind defendant over for trial lacked any justification or excuse. See *Orzame, supra* at 557. Accordingly, I would conclude that the circuit court erred in finding an abuse of discretion and granting the motion to quash the information, and would reverse the circuit court's order and remand for further proceedings against defendant.

/s/ Peter D. O'Connell

[1] Interestingly, the majority concludes that the prosecutor did not present evidence that probable cause existed to believe that defendant intentionally accessed the computer without authorization and with the intent to delete data. On appeal, defendant only disputes whether probable cause existed that a loss of at least $20,000 occurred. Accordingly, I would limit our analysis to the question presented by defendant.

[2] I am troubled by the majority's implied acceptance of defendant's argument that, because Breed Technologies was not required to actually incur the cost of replacing the data, no loss was suffered and, thus, an aggregate amount of at least $20,000 was not involved. The statute provides that the aggregate amount consists of any loss including the value of computer data lost, stolen, or rendered unrecoverable. MCL 752.792(2); MSA 28.529(2)(2), and MCL 752.793(1); MSA 28.529(3)(1). The evidence indicated that the value of the allegedly stolen data was approximately $150,000. That defendant eventually returned the data does not shield him from criminal liability. To hold otherwise is to imply that defendants may avoid punishment for theft offenses merely by returning the stolen item—a position that I doubt the majority would find tenable.